Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
FCC Seeks Comment on Adopting Egregious Cases Policy	)	GN Docket No. 13-86
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JOINT COMMENTS OF RADIO AND TELEVISION BROADCASTERS

Emmis Communications Corporation
Mission Broadcasting, Inc.
New Vision Television
Nexstar Broadcasting, Inc.
Radio One, Inc.

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I. INTRODUCTION AND SUMMARY

Pursuant to the *Public Notice* issued on April 1, 2013,[1] Emmis Communications Corporation, Mission Broadcasting, Inc., New Vision Television, Nexstar Broadcasting, Inc., and Radio One, Inc. (collectively, "Joint Commenters"), hereby submit these comments regarding the indecency enforcement policies of the Federal Communications Commission ("FCC" or "Commission"). As discussed below, constitutional considerations require the FCC to provide broadcasters with much-needed clear guidance regarding the contours of its indecency enforcement policy, which has been imperiled by continuous litigation for now nearly a decade. These very same considerations also require the Commission to adhere to a restrained approach and to make certain changes to the procedures that it employs when reviewing indecency complaints.

[1] Public Notice, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, DA 13-581 (Apr. 1, 2013) ("*Public Notice*"). The deadline for comments was extended until June 19, 2013 by Public Notice issued May 10, 2013. Public Notice, *FCC Extends Pleading Cycle for Indecency Cases Policy*, DA 13-1071 (May 10, 2013).

II. THE COMMISSION IS REQUIRED TO PROVIDE BROADCASTERS WITH FAIR NOTICE OF WHAT CONTENT WILL BE CONSIDERED INDECENT BEFORE IT CAN RESUME ENFORCEMENT OF ITS INDECENCY POLICY.

The *Public Notice* seeks comment on "whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are."[2] By asking this question, the *Public Notice* erroneously assumes that there exists a "current broadcast indecency polic[y]" that is clear enough to pass Constitutional muster. To the contrary, *FCC v. Fox Television Stations, Inc.*[3]—the very Supreme Court decision which prompted the *Public Notice*—makes clear that the "current . . . policy" is unconstitutionally vague and may not be enforced without clarification.

In *FCC v. Fox II*, the Supreme Court held that the Commission's decisions to treat fleeting expletives and fleeting nudity as actionably indecent violated the Due Process Clause of the Fifth Amendment.[4] Reviewing the FCC findings that broadcasts of the *Billboard Music Awards* and *NYPD Blue* were actionably indecent, the Court found that because the agency "failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionabl[e]," application of the new policy announced in the *Golden Globe Awards Order*[5] to the broadcasts at issue was unconstitutional.[6] This holding was rooted in the "fundamental principle . . . that laws which regulate persons or entities must

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[2] *Id.* at 2.

[3] 132 S. Ct. 2307 (2012) ("*FCC v. Fox II*").

[4] *Id.* at 2317-20.

[5] *Complaints Against Various Broadcast Licensees Regarding the Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) ("*Golden Globe Awards Order*").

[6] *FCC v. Fox II*, 132 S. Ct. at 2320.

give fair notice of conduct that is forbidden or required."[7] The Court further noted that the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment."[8] As the Court explained, "[e]ven when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, [that] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[9] And where, as here, "speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[10]

The *Public Notice* refers generally to the FCC's "current" policy regarding indecency, but neither that document nor any other pronouncement by the agency clearly explains just what the Commission believes its current indecency policy is. The FCC generally defines indecent content as material that "describe[s] or depict[s] sexual or excretory organs or activities" in a manner that is "patently offensive as measured by contemporary community standards for the broadcast medium."[11] But the terms used by the Commission to describe indecent content do not provide sufficient clarity on their own. Indeed, the Supreme Court has already held, in *Reno v. ACLU*, that the word "indecent," standing alone, lacks the degree of clarity that is required to

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[7] *Id.* at 2317 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

[8] *Id.* (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

[9] *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

[10] *Id.*

[11] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 FCC Rcd 7999, ¶¶ 7-8 (2001) ("*2001 Policy Statement*").

survive a vagueness challenge.[12] Similarly, the *Reno* Court held that a statute prohibiting material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities" was unconstitutionally vague.[13] The language struck down in *Reno* is "almost identical to the Commission's" generic definition of broadcast indecency. Because "[b]roadcasters are entitled to the same degree of clarity as other speakers," any FCC indecency enforcement policy can pass constitutional muster, and thus can provide a standard with which broadcasters can reasonably be expected to comply, only if the agency has provided sufficiently clear guidance through "further elaborat[ion]."[14] Joint Commenters respectfully submit that the Commission has not provided the necessary guidance or elaboration.

Although the FCC attempted to "provide guidance to the broadcast industry regarding . . . [its] enforcement policies with respect to broadcast indecency" in a Policy Statement issued in 2001,[15] that guidance has since been modified or its interpretation blurred by numerous subsequent decisions, some of which are contradictory. Even assuming the *2001 Policy Statement* offered sufficient clarity to pass constitutional muster at the time it was issued, the

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[12] 521 U.S. 844, 871 (1997); *see also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) (describing the term "indecent" as calling for "wholly subjective judgments") (citing *United States v. Williams*, 553 U.S. 285, 306 (2008)).

[13] *Reno*, 521 U.S. at 871.

[14] *Fox Television Stations, Inc. v. FCC*, 613 F.2d 317, 329 (2d Cir. 2010) ("*Fox v. FCC II*"), *vacated on other grounds*, *Fox II*, 132 S. Ct. 2307. As the Second Circuit correctly held, the legal standard for evaluating a vagueness challenge does not differ depending on whether broadcasting or some other medium is involved, and "language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." *Id.* In *FCC v. Fox II*, the Supreme Court did not question this aspect of the Second Circuit's ruling and itself applied the same test for vagueness that applies outside of the broadcast context.

[15] *2001 Policy Statement*, ¶ 1.

agency's later actions have created significant uncertainty with respect to what the Commission's indecency policies are.

In its *2001 Policy Statement*, the FCC elaborated on its generic indecency definition by setting forth three factors it would apply to evaluate whether a broadcast involving a description or depiction of sexual or excretory activities or organs was patently offensive: (1) the "explicitness or graphic nature of the description or depiction;" (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or titillate, or whether the material appears to have been presented for its shock value."[16] In that decision, the FCC emphasized that "fleeting and isolated" expletives would *not* be considered actionable.[17]

Approximately three years later, the Commission reversed course and determined that some, although not all, fleeting expletives would be considered actionable. It first announced this new policy in 2004 in considering complaints regarding Bono's use of the "F-Word" during the *Golden Globe Awards*, and in that decision overruled all prior cases in which it had found that the broadcast of a fleeting expletive was *per se* not actionable.[18] Later that year, the FCC found that the exposure of Janet Jackson's nude breast for 19/32 of a second during the *Super Bowl XXXVIII Halftime Show* was indecent, despite its fleeting nature.[19] In subsequent decisions, the Commission applied its new "fleeting expletive" and "fleeting nudity" policies to

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[16] *Id.* ¶ 10.

[17] *Id.* ¶ 18.

[18] *Golden Globe Awards Order*, 19 FCC Rcd 4975.

[19] *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd 19230 (2004), *reconsideration denied*, 21 FCC Rcd 2760 (2006).

adjudicate numerous complaints, some of which were resolved in orders the FCC said were intended to "provide substantial guidance to broadcasters and the public" about what broadcast content would and would not be considered indecent under the new regime.[20]

In reality, however, these decisions served only to further muddy the waters. For example, the agency found isolated use of the "S-Word" and its derivatives to be indecent when used during the live broadcast of an awards show, but not to be indecent when part of a "*bona fide* news interview."[21] With respect to news programming, the FCC alternatively stated it recognizes a need to "proceed[] with caution in [its] evaluation of complaints involving news programming" due to the First Amendment concerns involved, while going out of its way to remind broadcasters that "there is no outright news exemption from [the FCC's] indecency rules."[22] As further discussed below, these mixed messages have the effect of inhibiting broadcasters (including several of the Joint Commenters that offer both entertainment and news programming) from providing certain content to the public, for fear that heavy fines or sanctions may be levied against them.

The FCC also found even repeated use of the F-Word and S-Word *not* to be actionable if, in the agency's determination, such use was "demonstrably essential to the nature of an artistic or

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[20] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, ¶ 2 (2006) ("*Omnibus Order*"); *see also Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* 21 FCC Rcd 2732 (2006); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1920 (2005) ("*PTC Order I*"); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1931 (2005) ("*PTC Order II*").

[21] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, ¶¶ 67-73 (2006) ("*Omnibus Remand Order*").

[22] *Id.* ¶ 71.

educational work or essential to informing viewers on a matter of public importance," as the agency concluded with respect to the broadcast of the film *Saving Private Ryan.* However, the Commission reached the opposite conclusion in adjudicating complaints concerning PBS stations' airing of the critically acclaimed documentary *The Blues: Godfathers and Sons?*.[23] Other words that might be considered offensive have been found *not* to be actionable in particular broadcasts.[24] However, broadcasters have every reason to fear the Commission might take the position in a subsequent case that their use could be considered indecent, because of both the shifting and contradictory nature of the agency's precedent in this area, and the great pains that the FCC has taken to emphasize the importance of "context" to its indecency analysis. Accordingly, broadcasters are left at the Commission's whim with respect to what programming meets the agency's "artistic or educational work" standard.

Moreover, in some cases the FCC has viewed the airing of warnings preceding a broadcast as highly relevant, but in others it has deemed them insufficient to avoid a finding that a program is indecent.[25] And although many of the FCC's decisions take the position that attempts to obscure nudity through the use of pixilation or other editing techniques will not

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[23] *Omnibus Order*, ¶ 82; *see Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film Saving Private Ryan*, 20 FCC Rcd 4507 (2005). *But see Omnibus Order*, ¶ 72.

[24] *Omnibus Order*, ¶¶ 193, 197 (finding uses of "hell," "damn," "bitch," "pissed off," "up yours," "ass," "for Christ's sake," "kiss my ass," "fire his ass," "ass is huge," and "wiping his ass" not to be indecent); *PTC Order I*, ¶¶ 6, 8 (finding uses of "dick," "power dick," "ass," "pissed," "bastard," "penis," "son of a bitch," "testicle" and "vaginal" not to be indecent); *PTC Order II*, ¶ 8 (finding uses of Hell," "damn," "orgasm," "penis," "testicles," "breast," "nipples," "can," "crap" and "bitch" not to be indecent).

[25] *Compare Saving Private Ryan*, ¶ 15 (noting warnings as important), *with Omnibus Order*, ¶ 38 (dismissing warnings in finding program to be indecent).

protect against a finding of actionable indecency,[26] the Department of Justice voluntarily dismissed suits filed to collect the fines imposed in one group of these cases.[27]

Based on a review of many of the decisions cited above, the Second Circuit previously determined that the Commission's indecency enforcement policy is unconstitutionally vague in its entirety.[28] The Second Circuit found that under the FCC's "indiscernible standards" broadcasters "were left to guess" whether content would be found indecent, and, therefore, that "the FCC's indecency policy has chilled protected expression."[29] Accordingly, it struck down the Commission's indecency policy as a whole.[30]

The Supreme Court found a narrower ground for reversing the FCC's orders regarding the *Billboard Music Awards* and *NYPD Blue*: that it was unconstitutional for the Commission to apply the policy to Fox and ABC because they lacked fair notice at the time of the relevant broadcasts.[31] However, because the Commission has not yet provided any clear guidance to

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[26] *E.g.*, *Omnibus Order*, ¶ 23; *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, 19 FCC Rcd 20191 (2004).

[27] *See, e.g.*, *U.S. v. Fox Television Stations, Inc.*, Civil Action No. 08-584 (PLF), Notice of Voluntary Dismissal (filed Sept. 21, 2012).

[28] *Fox v. FCC II*, 613 F.2d at 327-335.

[29] *Id.* at 332-33.

[30] *Id.* at 319, 335 (holding that the Commission's indecency policy "fails constitutional scrutiny" under the First Amendment because it is impermissibly vague and vacating both the order under review "and the indecency policy underlying it"); *see ABC, Inc. v. FCC*, 404 Fed. Appx. 530, 2011 WL 9307, *3 & n.3 Nos. 08-8041-ag, et al. (2d. Cir. Jan. 4, 2011) (noting that the Commission and the United States had conceded that *Fox v. FCC II* "invalidated the [FCC's] indecency policy in its entirety").

[31] *FCC v. Fox II*, 132 S. Ct. at 2320 ("[I]t is unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications.").

broadcasters on what is actionably indecent under its policies, Joint Commenters respectfully submit that the Second Circuit's void for vagueness analysis is the right one.

This analysis, moreover, renders equally invalid the Commission's "egregious cases" policy that it currently claims to be applying.[32] The FCC has not defined the term "egregious," leaving broadcasters with no guidance as to what the Commission will deem to be of such flagrant, blatant, and glaring offensiveness to be deemed "egregious." Indeed, to Joint Commenters' knowledge, "egregious" has been used only once before with respect to indecency, in the *2001 Policy Statement*'s discussion of the re-broadcast of programming previously held to be indecent.[33] Whether the Commission intends to consider only such re-broadcasts to be "egregious," and thus apply an "egregious cases" policy in a limited manner, is not at all clear.

The absence of meaningful and consistent guidance regarding the contours of the FCC's indecency policy creates a real chilling effect on broadcaster speech. Although the Commission professes that "context" is "critically important" in its indecency determinations,[34] it overlooks the "context" in which broadcast decisions must often be made, particularly in the case of live programming. In *that* context, production and programming staff must make determinations as to whether words, phrases, or images may run afoul of the agency's restrictions on a near real-time or real-time basis. Yet, the Commission's existing "guidance" consists of a complex, multi-part test, embellished by individual adjudicatory decisions that, as noted above, reach conclusions that cannot be logically reconciled, on top of which it has now piled an undefined

[32] *Public Notice*, at 2.

[33] *2001 Policy Statement*, ¶ 27 ("If the Commission previously determined that the broadcast of the same material was indecent, the subsequent broadcast constitutes egregious misconduct and a higher forfeiture amount is warranted."). This statement, moreover, refers not to the content of the broadcast, but to the amount of the forfeiture to be assessed.

[34] *Id.* ¶ 9.

"egregious" standard. This absence of clarity regarding the indecency policy's contours, particularly when a mistaken judgment can carry significant fines, naturally leads station staff to be overly cautious. The result is *de facto* censorship of speech that is clearly protected,[35] a result clearly proscribed by the First Amendment. For all these reasons, the FCC must provide broadcasters with much-needed clarity before it resumes its indecency enforcement efforts, and can apply its new policy only to broadcasts aired *after* it clarifies what that policy is.

III. THE COMMISSION SHOULD ADHERE TO A RESTRAINED APPROACH TO ENFORCING ITS BROADCAST INDECENCY POLICY.

Joint Commenters also respectfully submit that the Commission should maintain a restrained approach under which fleeting expletives are not considered to be indecent, and should treat isolated nudity as similarly non-actionable.[36] Neither the Supreme Court's decision in *Pacifica Foundation v. FCC*[37] nor any other judicial precedent authorizes the broader approach to broadcast indecency that the Commission began to develop in 2004. Indeed, such a sweeping view of indecency cannot be squared with the First Amendment.

Although the Commission has previously suggested that *Pacifica* authorizes its treatment of isolated expletives and nudity as actionable, this position overlooks just how narrow the holding in *Pacifica* was. The *Pacifica* case involved the broadcast of George Carlin's twelve-minute "Filthy Words" monologue, which involved a list of "words you couldn't say on the . . . .

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[35] For instance, a board operator at one affected station reportedly felt it necessary to bleep the word "urinate" for fear it might be held indecent, even though the Commission has, as noted above, held "piss" and variants not to be indecent. *See supra* note 24; *see also* Jacques Steinberg, Eye on the FCC, TV and Radio Watch Words, N.Y. TIMES, May 10, 2004, at A1 (reporting that a station edited "urinate," "damn," and "orgy" from a Rush Limbaugh Show segment).

[36] *See Public Notice*, at 1-2.

[37] 438 U.S. 726 (1978).

airwaves" repeated "over and over again."[38] In upholding the FCC's determination that the broadcast was indecent, a plurality of the Supreme Court expressly "emphasize[d] the narrowness" of its holding.[39] The Court noted, in particular, that it had "*not* decided that an occasional expletive . . . would justify any sanction," and that the agency had itself expressly stated that the order under review was "issued in a specific factual context."[40] As Justice Powell explained in his concurring opinion in *Pacifica*, "certainly the Court's holding . . . does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here."[41] At the time, the FCC too recognized that *Pacifica* was confined to its facts, and stated its "intent[] strictly to observe the narrowness of the *Pacifica* holding."[42] Later decisions of the Supreme Court have confirmed the "emphatically narrow" nature of the *Pacifica* decision.[43]

An indecency policy under which the Commission claims authority to declare fleeting expletives and isolated nudity to be actionably indecent—subject to its own determination of whether programming falls within ill-defined exceptions for "*bona fide* news interviews" or artistic necessity—is simply not supported by the narrow holding in *Pacifica*. Although the FCC

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[38] *Id.* at 729.

[39] *Id.* at 751.

[40] *Id.* at 734, 751 (emphasis added).

[41] *Id.* at 760-61 (Powell, J., concurring in part and concurring in the judgment).

[42] *WGBH Educ. Found.*, 69 FCC 2d 1250, 1254 (1978); *see id.* (noting that the Court's decision "affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station").

[43] *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Reno*, 521 U.S. at 870; *see FCC v. Fox II*, 132 S. Ct. at 2312.

has a legitimate interest in protecting children from content that is particularly offensive, a policy that universally prohibits fleeting words or images, even when uttered or displayed in a manner beyond the reasonable control of broadcasters, necessarily sweeps far broader than necessary to accomplish that goal.[44] This is particularly so given that currently—unlike in 1978 when *Pacifica* was decided—children are exposed to content from multitudes of media and other sources, including cable, satellite television, satellite radio, and the Internet, that are not subject to any form of indecency regulation at all. Indeed, the Supreme Court recently confirmed that the government cannot constitutionally seek to immunize children from "minuscule real-world effects" that are "indistinguishable from effects produced by other media."[45] The technological and marketplace developments that have occurred in the thirty-plus years since the Court's decision in *Pacifica* call into question whether it would be decided the same way today. And the Commission cannot ignore the evolution of societal standards and trends regarding the use of the English language that has occurred since *Pacifica* was decided. At the very least, when coupled with the indisputable narrowness of the *Pacifica* holding, these developments counsel strongly in favor of a restrained approach to indecency enforcement under which material must be highly sexualized and pervasive in order to be considered actionable, and broadcasters are not subject to

[44] *See Sable*, 492 U.S. at 126 (recognizing interest in protecting children from content that is likely to threaten their "physical and psychological well being"); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 819 (2000) (striking down statute regulating highly sexual cable television programs and noting that the law forbade films containing material "as fleeting as an image appearing on a screen for just a few seconds"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (striking down ordinance banning films containing any form of nudity from outdoor theaters because "[t]he ordinance is not directed against sexually explicit nudity" but instead "sweepingly forbids . . . films containing any uncovered buttocks . . ., irrespective of pervasiveness").

[45] *Brown v. Entm't Mercs. Ass'n*, 131 S. Ct. 2729, 2739 (2011); *see Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 766 (1996) (plurality opinion) (noting that unless there is "a factual basis substantiating the harm[,] . . . we cannot assume that the harm exists").

post hoc subjective judgments by regulators regarding whether programming is "news" or material is "artistically necessary."

There is also no reason to fear that, absent an aggressive indecency enforcement policy, broadcasters will suddenly begin littering the public airwaves with offensive content. Many broadcasters engage in self-regulatory initiatives, including programming policies and training efforts, designed to prevent the broadcast of inappropriate material. Some may post warnings if they anticipate content might be considered by some viewers or listeners to be "graphic," even if not indecent. And some have adopted policies of restricting content that they believe might offend their audiences, such as racial epithets, or sexist or anti-gay remarks, even though that content falls outside of the scope of indecency regulation. Although necessarily shaped in part by the FCC's indecency policies, these initiatives exist independent of the Commission's regulatory regime, and reflect broadcasters' efforts to satisfy the desires and sensitivities of their audiences.

IV. CHANGES TO THE COMMISSION'S INDECENCY ENFORCEMENT PROCEDURES ARE NECESSARY TO AVOID AN IMPERMISSIBLE CHILLING EFFECT ON PROTECTED SPEECH.

The Supreme Court has recognized that vague enforcement standards "raise[] special First Amendment concerns because of [their] obvious chilling effect on free speech."[46] Here, these First Amendment concerns are heightened due to certain procedural aspects of the Commission's indecency enforcement process. The FCC has not only failed to provide broadcasters with notice of a clear standard under which they will be judged, but also insists on protecting its own right to take enforcement action based on pending complaints, that are often

[46] *Reno*, 521 U.S. at 871-72 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-51 (1991)).

several years old but have not yet been adjudicated, as a condition of action on licensing and transfer applications.[47]

Moreover, in most if not all cases the agency fails to notify broadcasters of pending complaints until it decides, often many years after receiving a complaint, to initiate an investigation. By that time, broadcasters are often limited with respect to the records available to support any defense to a specific complaint. And then, the FCC delays substantially a final decision on the merits. This means that licensees constantly must question whether content they aired previously will suddenly be declared actionable. Further, even after the FCC reaches a decision that material is *not* indecent, it generally fails to notify broadcasters of these determinations, preferring to instead leave them in limbo. These aspects of the Commission's broadcast indecency enforcement regime serve only to compound the already significant chilling effect that the vagueness of the substantive standard has on broadcasters' speech, and should not be part of any new policy that the FCC may adopt.

Accordingly, any revised indecency policy should require a prompt initial determination of whether a complaint is facially valid. Any complaint that is initially viewed as potentially meritorious should then be processed within a set time frame that, while providing the broadcaster with a reasonable period of time to respond to any inquiry, is designed to decrease the likelihood that complaints will become stale and increase the likelihood that the programming in question is not rebroadcast. Further, the FCC should commit to notifying broadcasters of pending complaints and the conclusions that the agency reaches about them. These actions—which should apply to both complaints filed after the issuance of any new policy and those that are pending now—are necessary to ensure that the Commission continues to clear

[47] *See, e.g., Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd 4238 ¶ 271 (2011).

the backlog of pending complaints and that, once that backlog is finally cleared, the agency does not create a new one.[48]

V. CONCLUSION

For these reasons, the FCC is required to clarify its indecency policies before it may resume enforcement efforts, and must limit its enforcement to broadcasts occurring after the issuance of this clear guidance. Any new policy should hold fleeting words and images not to be indecent, and should avoid the use of procedures that have enhanced the chilling effect of the current policy on broadcast speech.

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[48] By expediting the processing of indecency complaints, these procedural safeguards would also likely reduce, if not eliminate entirely, the need for tolling and escrow agreements, which impose unnecessary transaction costs on broadcast licensees and parties seeking to acquire station licenses. In the case of escrow agreements in particular, the Commission should also (1) decline to require any escrow at all if the party acquiring a license agrees to assume financial responsibility for any forfeiture, and (2) at a minimum, commit to resolving complaints subject to escrow on an expedited timetable so that funds are not tied up indefinitely.

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